

THE HIGH COURT

[2019 No. 3789P]

BETWEEN

KBC BANK IRELAND PLC

PLAINTIFF

AND

MICHAEL ANTHONY MCGANN, DAVID MCGANN
GERALDINE MCGANN

AND

PERSONS UNKNOWN OCCUPYING PREMISES AT FALSK, STROKESTOWN, COUNTY
ROSCOMMON

DEFENDANTS

Ex tempore JUDGMENT of Mr. Justice Allen delivered on the 11th day of October, 2019

1. This is an application on behalf of KBC Bank Ireland plc for a variety of interlocutory injunctions restraining the defendants from trespassing on a property at Falsk, Strokestown, Co. Roscommon.
2. There was no appearance by or on behalf of the first defendant, but the affidavit of Tom Ryan filed on 30th May, 2019 shows that he was duly served with the plenary summons and the motion papers.
3. The grounding affidavit of Danny Noone, a bank official with KBC Bank, tracked the long history of dealings between the bank and the defendants, principally the first defendant, since 2003 when the bank's predecessor-in-title IIB Homeloans Limited, first loaned money to the first defendant but the vast majority of Mr. Noone's evidence is not really relevant to this application.
4. What is relevant is that by special summons issued on 12th May, 2009 possession proceedings were instituted by the bank against the first defendant Michael Anthony McGann claiming an order for possession of the property at Falsk, Strokestown, Co. Roscommon being the property comprised in Folio 32752 Co. Roscommon, which had been charged to the bank by the first defendant by deed of charge dated 6th January, 2004 to secure repayment by the first defendant to the bank of all present and future advances, which loans it was claimed the first defendant had failed to pay.
5. Shortly after the special summons was served on the first defendant it became apparent that the first defendant's mother, Mrs. Elizabeth McGann, and his brother Mr. David McGann, who is the second defendant in this action, were living in the property.
6. Order 9, r. 8 of the Rules of the Superior Courts requires that in any action for recovery of land the summons must be served on every person who is in actual possession or in receipt of the rents or profits of the lands or any part thereof.
7. On 17th June, 2011 the special summons was served on Mrs. Elizabeth McGann, who was then informed of the date upon which the summons would next be listed before the High Court. On 27th July, 2011 the summons was served on Mr. David McGann who was informed of the date on which the summons would next appear on the list.

8. The bank's application was heard by the High Court (Dunne J.) on 15th October, 2012. There was no appearance by or on behalf of Michael Anthony McGann the named defendant, or Elizabeth McGann or David McGann who had been served with a copy of the summons and the court made an order for possession against Michael Anthony McGann.
9. The order for possession was served on Michael Anthony McGann on 6th February, 2013 and on each of Mrs. Elizabeth McGann and David McGann on the 14th February, 2013.
10. In the following years there was some engagement between the bank and the first defendant in relation to the possibility of payment, and the first defendant made a number of applications to the High Court to set aside the order of the 15th October, 2012. The debt was not paid, and the order was not set aside.
11. Order 42, r. 5 of the Rules of the Superior Courts allows a judgment for recovery or the delivery of possession of land to be enforced by order of possession. On 8th August, 2018 the banks sued out an order for possession directed to the County Registrar for the County of Roscommon to enter the property and without undue delay cause the bank to have possession of the lands and premises and the order was sent to the County Registrar for execution.
12. The County Registrar directed that the order for possession be executed on 11th December, 2018 at 1.00 pm and gave notice that that would be done.
13. A party of the two court service officers, two security consultants, eight security officers (two with dogs), two staff members from the bank, including Mr. Noone, three engineers and three livestock handlers went to the property. There were eight members of An Garda Síochána present.
14. Mr. Noone deposes that those present were present to "execute the order" but goes on to describe precisely what happened. It is clear that the order was executed by the court messenger who it was was approached by the first defendant who asked for sight of the order of possession and was shown it.
15. At the property when the court messenger arrived was a party of seven men and one woman. They refused to vacate the property and the court messenger informed the gardaí that it would be necessary to forcibly remove the occupants. The occupants were removed to the roadside and the locks to the house were drilled out. The second and third defendants were found in the front living room of the house. They initially refused to leave but following the attendance of the gardaí agreed to do so, and did. The livestock were removed from the land and at 4:15pm the County Registrar delivered possession to Mr. Noone as the authorised representative of the bank.
16. The bank having obtained possession put in place a security detail to protect the property, and over the following days arrangements were made to allow the first and third defendants to remove some farm machinery and personal items.

17. In the early hours of 16th December, 2018 the eight security men and two dogs who were protecting the property were confronted by a large group of men who attacked the property, the vehicles and equipment of the security men, and the security men. All of the security personnel were injured, three of them seriously and one of the dogs had to be put down. Following the attack, the gardaí took control of the house and yard and held them as an active crime scene until the 17th December, 2018.
18. In circumstances which are not entirely clear the security personnel were not replaced when the garda investigation of the scene of the attack was completed and at some point on 17th December, 2018 the second and third defendants took up occupation and were later joined by the first defendant. The defendants were called upon in correspondence to vacate the property but refused to do so.
19. In response to this application Mr. David McGann swore an affidavit on 9th July, 2019. Mr. McGann deposes that the property has always been his family home since his birth in 1958. He first lived there with his grandmother and his parents and since they died, with his brother, the first defendant. He says that his sister Geraldine, the third defendant, occasionally resides there.
20. Significantly, the second defendant does not claim that he was ever in possession of the property or even that he ever had right to live there. Mr. McGann observes that neither he nor the third defendant were parties to the possession proceedings brought by the bank against the first defendant but does not dispute that he was given notice of those proceedings and that he was served with the order of the 15th October, 2012.
21. Mr. McGann addresses the issues of the adequacy of damages and the balance of convenience "*on the assumption*" that there is a fair or *bona fide* issue to be tried, but he does not identify what he says the *bona fide* issue might be.
22. He suggests that on 11th December, 2018 the bank attempted to take possession of the property without providing the order for inspection. In the first place it is quite clear that it was the County Registrar for County Roscommon who took possession. As far as the County Registrar is concerned, it was not an attempt. Secondly, Mr. McGann acknowledges that he was in the sitting room of the house so that he could not have seen nor heard the exchange between his brother and the court messenger in relation to the order.
23. Mr. McGann objects to what he says is the prejudicial manner in which Mr. Noone presents his version of the events of 16th December, 2018 but he does not suggest that Mr. Noone's account is incorrect.
24. Mr. McGann observes that the bank delayed for five years and ten months between the making of the order on 15th October, 2012 and obtaining the order for possession and for six years and nine months before issuing these proceedings.

25. The plaintiff's delay in executing the order of the 15th October, 2012 is explained. In any event that delay was entirely to the second defendant's advantage. The suggestion that there was a delay of six years and nine months in issuing these proceedings does not make sense. The cause of action on which these proceedings is founded is trespass which commenced on 17th December, 2018 and which has been continuing since. The plenary summons on this action was issued on 14th May, 2019 and Mr. Noone explains that the plaintiff at the request of the gardaí did not move immediately in the hope that tensions on the ground might ease.
26. Ms. Geraldine McGann swore a short affidavit about which she confirmed the correctness of her brother's affidavit.
27. Mr. McGann's assumption, and Mr. Mulloy's submission, that there is a *bona fide* issue to be tried is based on the fact that he has issued proceedings against the security people who were at the property on 11th December, 2018 as well as the bank, the County Registrar for the County of Roscommon, Ireland and the Attorney General.
28. The first relief claimed in that action is an order restraining the defendants, their servants and agents and all persons acting in concert with them and all persons having notice of the making of the orders herein from taking possession of and/or interfering with the property at Falsk, Strokestown, Co. Roscommon, being the property comprised in Folio 32752 of the Register of Freeholders.
29. Neither the affidavit of the second defendant filed in these proceedings nor the statement of claim delivered in the other action discloses any basis on which Mr. McGann might conceivably be entitled to such an order.
30. The plea in the statement of claim, perfectly consistently with the second defendant's affidavit, is that Mr. McGann was at all material times a resident in the property. He does not assert a right to possession or even a right of residence. He does not or could not sensibly challenge the bank's right to possession.
31. Secondly, Mr. McGann claims a declaration that the acts of the defendants each and either of them of 11th December, 2018 were unlawful and/or in breach of the Enforcement of Court Orders Act, 1926 as amended.
32. The basis of this claim is that the power of execution of a court order is reserved to the County Registrar, which it is; that the Enforcement of Court Orders Act, 1926 allows a possession order to be executed by a County Registrar or a court messenger, which it does; that court messengers may be appointed by the County Registrar with the approval of the Minister of Finance, which they may; and that the County Registrar may only delegate his power to a designated court messenger, which is also correct.
33. The statement of claim asserts that at all material times the security people, the bank and the County Registrar "*purported to act on foot of the execution order*" and that the security people and the bank "*were not acting under the authority of*" the County

Registrar pursuant to a valid warrant and "*therefore acted contrary to the Enforcement of Court Orders Act, 1926*".

34. Mr. McGann's allegation in the statement of claim as to what happened on 11th December, 2018 is that the bank and its servants and agents "*attempted to take possession of the property pursuant to the possession order which was executed by the County Registrar on or about 27th August, 2018*".
35. No particulars are given as to what the bank or its servants or agents are alleged to have done in the course of the alleged attempt to take possession but critically Mr. McGann's case matches precisely what Mr. Noone says, namely, that the order for possession was executed by the County Registrar.
36. The plenary summons issued by Mr. McGann and the prayer to the statement of claim delivered by him goes on to claim a variety of declarations as to alleged infringements by the defendants to that action, other than the County Registrar, of the Enforcement of Court Orders Act, 1926 and declarations that the actions of each of the defendants, including the County Registrar, were in breach of the plaintiff's constitutional rights and his rights under the European Convention on Human Rights.
37. Mr. Mulloy invokes Mr. McGann's constitutional right to the inviolability of his dwelling but does not point to any legal basis upon which his client was or even might have been entitled to enter the house at Falsk, Strokestown, Co. Roscommon on 17th December, 2018 or to have remained there.
38. The property was not on the 17th December, 2018 Mr. McGann's dwelling. It had been until a week before, but it ceased to be when the order for possession was executed.
39. What Mr. McGann's case boils down to is a proposition that a County Registrar in the execution of a court order for possession may not be accompanied or assisted by any person who is not a court messenger. No legal basis has been put forward for that proposition. Even if there was a basis to that argument it is a leap to suggest that the delivery of possession by the County Registrar to the bank could somehow be invalidated by the fact that the locksmith was not a court messenger.
40. Mr. Fanning, for the bank, emphasised that he was not making the case that any of the defendants in this case were responsible for the events of the 16th December, 2018. As far as the application of the law is concerned, I do not believe that the circumstances in which the property came to be unattended on 17th December, 2018 are really relevant.
41. This, in my view, is a simple case. On 11th December, 2018 the County Registrar for the County of Roscommon - as he had been commanded to do by order of the Chief Justice made on the 8th August, 2018 - entered the property at Falsk, Strokestown, Co. Roscommon and without delay caused KBC Bank Ireland plc to have possession of the said lands and premises, with appurtenances. When on 17th December, 2018 the

second and third defendants went onto the land they did so as trespassers and when the first defendant joined them he did so as a trespasser.

42. The law is clear. It was stated by Keane J. (as he then was) in *Keating and Company Limited v. Jervis Street Shopping Centre Limited* [1997] 1 I.R. 512 at p. 518 and had been consistently applied since. What Keane J. said was that: -

"It is clear that a landowner, whose title is not in issue, is prima facie entitled to an injunction to restrain a trespass and that this is also the case where the claim is for an interlocutory injunction only. However, that principle is subject to the following qualification explained by Balcombe L.J. in the English Court of Appeal in Patel and Others v. W. H. Smith (Eziot) Limited and Another [1987] 1 W.L.R. 843 at p. 859.

'However, the defendant may put in evidence to seek to establish that he has a right to do what would otherwise be a trespass. Then the court must consider the application of the principle set out in American Cyanamid Company v. Ethicon Limited (1975) 1 All E.R. 504 in relation to the grant or refusal of an interlocutory injunction.'

43. This is not a case of a landowner whose title is in issue. The defendants have not in evidence sought to establish that they have a right to do what would otherwise be and what is a trespass.
44. I find that the bank is entitled to the interlocutory orders it seeks.